

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION**

John Ervin Wilson, Jr.)	Case No. 9:22-1248-RMG
)	
Petitioner,)	
)	ORDER
v.)	
)	
Warden Sharp,)	
)	
Respondent.)	
_____)	

This matter is before the Court on the Report and Recommendation (“R&R”) of the Magistrate Judge recommending that the Court dismiss this petition for habeas relief without prejudice and without requiring Respondent to file a return because this is a successive § 2254 petition and Petitioner has not obtained permission from the Fourth Circuit Court of Appeals to file a successive petition. (Dkt. No. 11). Plaintiff, an inmate in the Lee Correctional Institution within the South Carolina Department of Corrections, filed this action *pro se*.¹

I. Legal Standards

A. *Pro Se* Pleadings

This Court liberally construes complaints filed by *pro se* litigants to allow the development of a potentially meritorious case. *See Cruz v. Beto*, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972). The requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleadings to allege facts which set forth a viable federal claim, nor can the

¹ Petitioner was convicted on September 19, 2006 of armed robbery and possession of a weapon. He was sentenced to 30 years imprisonment on the armed robbery conviction and a term of five years consecutive on the weapons conviction.

Court assume the existence of a genuine issue of material fact where none exists. *See Weller v. Dep't of Social Services*, 901 F.2d 387 (4th Cir. 1990).

B. Magistrate Judge's Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *See Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made. Additionally, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where the plaintiff fails to file any specific objections, “a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation omitted). Petitioner filed no objections to the R&R, so the R&R is reviewed for clear error.

II. Discussion

The Anti-Terrorism and Effective Death Penalty Act of 1996 (ADEPA) governs the filing of a second or successive § 2254 petition for habeas relief. A petitioner seeking § 2254 relief for a second or successive petition must first obtain the permission of the court of appeals for the appropriate circuit. 28 U.S.C. § 2244(b). The record shows that Petitioner filed a petition for habeas relief on April 15, 2013. The Magistrate Judge issued a R&R on December 18, 2013 recommending that the Court grant a motion for summary judgment in favor of the Respondent. This Court adopted that R&R as the order of the Court on January 13, 2014 and denied Petitioner a certificate of appealability. Petitioner subsequently appealed that decision to the Fourth Circuit

Court of Appeals, which dismissed the appeal on July 1, 2014. *Wilson v. McCall*, C.A. No. 9:13-1003, Dkt. Nos. 1, 36, 41, 48, 2014 WL 131382 (D.S.C. 2014); *appeal dismissed* 577 Fed. Appx. 199 (4th Cir. 2014).

The Magistrate Judge correctly concluded that in the absence of permission from the court of appeals to file a successive § 2254 petition, this Court has no jurisdiction over this matter. The Magistrate Judge recommended that the dismissal be without prejudice to allow Petitioner, if he wishes, to seek permission from the Fourth Circuit Court of Appeals to file a successive § 2254 petition.

Based on the foregoing, the Court **ADOPTS** the R&R of the Magistrate Judge (Dkt. No. 11) as the order of the Court. The matter is **DISMISSED WITHOUT PREJUDICE**.

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

June 14, 2022
Charleston, South Carolina